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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

[Protest Alleging Award's Bid Should Have Been Rejected as Nonresponsive]

FILE: B-199268

DATE: March 4, 1981

MATTER OF: A-1 Acoustical Ceilings, Inc.

DIGEST:

Bid found after bid opening to include required bid bond was properly accepted as responsive despite agency bid opening officials' announcement at bid opening that there was no bond, since protesting second low bidder has not submitted independent evidence to refute agency's evidence that bond was out of low bidder's control and in hands of Government before bid opening.

A-1 Acoustical Ceilings, Inc. (A-1), protests the award of a term contract to Brandolini Corporation (Brandolini), for partition work in Philadelphia area Federal buildings under invitation for bids (IFB) No. GS-03B-04404, issued by the General Services Administration, Region 3, Philadelphia, Pennsylvania (GSA). It contends that the Brandolini bid was not accompanied at the time of bid opening by a bid guarantee required by the IFB and should have been rejected as nonresponsive to the terms of the IFB, and that the contract awarded to Brandolini should be terminated and award made to A-1. For the reasons discussed below, the protest is denied.

The IFB, as amended, set bid opening at 11 a.m. on April 11, 1980. Paragraph 3.1 of section 0110, "Special Conditions," provides in pertinent part that "[t]he bidder shall submit with his bid, a bid guarantee in the penal amount of \$90,000." Paragraph 4 of Standard Form 22, "Instructions to Bidders," included in the IFB, warns bidders that where a bid guarantee is required by the IFB, failure to furnish one in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid. See Federal Procurement Regulations (FPR) § 1-2.404-2 (1964 ed. amend. 121).

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Of the three bids GSA received in response to the IFB, Brandolini was the apparent low bidder, the protester was the second low bidder, and F&S Quality Construction, Inc. (F&S), submitted the highest bid.

A-1 has [submitted affidavits] of representatives of the protester and of F&S [who were present concerning the events which transpired during the bid opening.] (Brandolini's representative deposited the firm's bid on the morning of April 11, 1980, but did not remain for the bid opening.) A-1's representative avers that [when the Brandolini bid was opened and the GSA employees conducting the bid opening announced that the bid contained no bid bond, he objected to any further reading of the Brandolini bid. Both GSA employees again searched for a bond with the Brandolini bid whereupon one left the room, made a telephone call, returned stating that she was told to read the prices entered on the Brandolini bid, and did so.] On April 14, 1980, [the A-1 representative sent a letter to the GSA Assistant Regional Administrator, protesting any award to Brandolini. The contract was awarded to Brandolini on June 9, 1980. Having received no response to the letter, A-1 filed its protest with our Office] on June 17, 1980.

The protester states that a thorough search for a bid guarantee for the Brandolini bid was made by the GSA personnel conducting the bid opening at the time the bids were opened, that no bid guarantee accompanied the bid at that time, that the Tabulation of Bids for Brandolini bears the entry "no bid bond," and that according to the notation on the bid tabulation, a bid bond for the firm was not located until April 18, 1980 (1 week after the bid opening). [A-1 asserts that where a bond has not been included in the bid, as required by the IFB, it may not be added at a later date, citing our decisions in Washington Patrol Services, Inc., B-196997, March 25, 1980, 80-1 CPD 220, and Engineering Service Systems, Inc., B-192319, July 19, 1978, 78-2 CPD 53.

[GSA reports, on the basis of affidavits submitted] by the two bid opening officials, the contract negotiator for the procurement, and the Chief of the Real Property

Services and Sales Branch, [that upon completing the opening and reading of all three bids, the bid opening officials took the bids and envelopes to the office of the contract negotiator, who immediately examined the materials and discovered the Brandolini bid bond attached to the firm's bid package.] GSA states that during the entire time from bid opening until the contract negotiator's discovery of the Brandolini bid bond, all three bids and envelopes were in the possession and view of the two bid opening officials or the contract negotiator and that they were neither tampered with nor was anything removed from or added to them.]

The contract negotiator states in her affidavit that when the bids and envelopes were brought to her office at about noon on April 11, 1980, she immediately looked at the Brandolini bid, [stapled to the upper left corner of which was a small, brown, letter-sized envelope in which she found the firm's bid bond folded in thirds like a letter.] Although one of the bid opening officials was in the room at the time, the contract negotiator did not say anything to her, but completed her examination of the bids and placed them in a locked file cabinet in her office. Sometime between April 11 and 16, 1980, she advised her superior, the Branch Chief, that she had found the bond. (The Branch Chief avers that she was so informed on April 14, 1980, the next working day following the bid opening.) She further states that the envelope or envelopes containing the Brandolini bid were discarded after bid opening but before A-1 filed its protest with our Office, and that she customarily discards bid envelopes shortly after bid opening unless they are late bids.

The bid bond (Standard Form 24) is dated April 11, 1980, refers to the instant IFB with the Brandolini Corporation as principal and Fidelity and Deposit Company of Maryland as surety, and is in the penal amount of \$90,000. [Brandolini states that at the time the firm submitted its bid, a bid bond was enclosed with the bid form in accordance with the requirements of the IFB and FPR § 1-2.404-4 (1964 ed. circ. 1).

A-1, however, argues that none of the four persons present at the bid opening saw the brown, letter-sized envelope in which the bond was purportedly discovered. The protester takes the position that it is not difficult for anyone to ascertain the contents of a bid envelope, that neither of the two bid opening officials saw a bond in the Brandolini envelope which they searched at least three times during the bid opening, and that it is simply beyond belief that they would not have seen it. A-1 questions why upon finding the bond the contract negotiator did not tell the bid opening officials of her discovery or so inform the Branch Chief until several days after bid opening and did not delete the entry, "no bid bond" on the Brandolini bid tabulation until April 18, 1980. A-1 believes that GSA's failure to retain the bid envelopes under the circumstances, as required by General Services Administration Procurement Regulations (GSPR) § 5A-2.402(m) (1979 ed.), further indicates that there was no bid guarantee accompanying the Brandolini bid at the time of the bid opening, citing GSPR § 5A-2.402(h) (1979 ed.), and that neither GSA nor Brandolini should be permitted to make the firm's bid responsive by adding a bid guarantee which was not present at the time specified in the IFB for bid opening. The protester concludes that the contracting agency's actions in handling the bid opening tainted the procurement, constitute improprieties and conduct tantamount to fraud, and together with the agency's failure to respond to A-1's protest to the Assistant Regional Administrator impugn the integrity of the bidding process.

GSA notes that we have held that the furnishing of a bid bond is a material requirement which cannot be waived, and that failure to submit one before bid opening renders a bid nonresponsive, Engineering Service Systems, Inc., supra. Further, that the contracting agency may reject a bid as nonresponsive, notwithstanding the bidder's assertion that the bond was included in its bid package and was in the agency's control before bid opening, where the bidder's contentions are not supported by independent evidence from other than the bidder's employees or surety to establish that the bond was submitted to the agency before bid opening, citing

our decisions in P. W. Parker, Inc., B-190286, January 6, 1978, 78-1 CPD 12; Roderick Construction, B-193116, January 30, 1979, 79-1 CPD 69; and Washington Patrol Service, Inc., supra. Unlike those cases in which the low bidder protested the rejection of its own bid for failure to submit a bid bond, GSA points out that here A-1, the second low bidder, has protested Brandolini's alleged failure to timely furnish a bid bond before bid opening. GSA argues that our decision in the Parker case shows both that a bid opening officer's statement concerning the existence of a bid bond at the time of the bid opening is not dispositive and that the contracting agency's determination as to the existence of a bond will be sustained absent persuasive, independent countervailing evidence. GSA contends that A-1 has not submitted such evidence. GSA believes that the affidavits of the bidders' representatives who attended the bid opening are consistent with those of the agency's bid opening officers, but show only that at the bid opening there appeared to be no Brandolini bid bond and do not refute the contract negotiator's affidavit that she later located the missing bid guarantee. Contrary to the protester's assertions, the agency explains, the April 18 notation on the Brandolini bid tabulation is only the date the notation (deletion of the entry, "no bid bond") was made, not the date the bid bond was found. GSA therefore concludes that the protester's evidence supports the contracting agency's determination that a bid bond was properly submitted by Brandolini, that an honest oversight by the bid opening officials created an appearance to the contrary, and that such a mistake should not be permitted to disqualify the low responsive, responsible bidder or to deprive the Government of a contract awarded at the lowest competitive price.

We stated in Parker that the focus of decisions which allows deviations from the bid bond requirement is that there must be independent affirmative evidence that the bid bond was (1) out of control of the bidder and (2) in the hands of the Government before bid opening. In Parker, the bid opening officer erroneously announced that the protester's bid included a bid bond

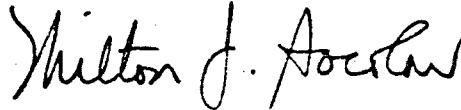
on the basis of the protester's indication to that effect in its bid. Shortly after bid opening, however, the agency's contracting specialist discovered that a bid bond had not been included with Parker's bid; upon retracing his steps and searching the bid documents, no bid bond was found. We held that contrary to Parker's assertion that we should assume from the bid opening officer's announcement that the Government lost the firm's bid bond, the fact that a thorough search of the bids after bid opening did not produce a bond indicated that the bond was not misplaced by the Government and that Parker failed to meet its burden of establishing by independent evidence that the required bond was submitted with its bid.

We agree with GSA that the evidence submitted by A-1 does not meet the standard set forth in the above-cited cases. The affidavits offered by A-1 are those of representatives of the bidders who attended the bid opening and, therefore, not independent evidence. More importantly, the affidavits of the bidders' representatives are essentially consistent with those of the GSA bid opening officials as to events in the bid opening room, but provide no insight into the events surrounding discovery of the bond. The affidavits of the agency's contract negotiator and Branch Chief do not conflict with one another and constitute independent affirmative evidence that the bid bond was out of Brandolini's control and in the hands of the Government before bid opening. See 40 Comp. Gen. 469, 472 (1961); cf. S. Puma and Company, Incorporated, B-182936, April 17, 1975, 751 CPD 230. We therefore conclude that GSA's acceptance of the Brandolini bid as responsive was proper. Accordingly, the protest is denied.

We share, however, the protester's concern with GSA's failure to respond to A-1's objections to the consideration of Brandolini's bid. (FPR §§ 1-2.407-8(a)(1) and 1-2.407-8(b)(1) (1964 ed. amends. 139 and 68) require that contracting officers consider all protests or objections regarding the award of a contract made before

or after award and that written confirmation or oral protests be requested if the matter cannot otherwise be resolved. See GSPR § 5A-2.407-8(a) (1979 ed.).

[We believe it would not be unreasonable to view the A-1 representative's oral objection to the reading of Brandolini's bid prices during the bid opening as an oral protest.] The protester's April 14 letter objecting to any award to Brandolini was unanswered for almost 2 months apparently because it was addressed to the Assistant Regional Administrator rather than to the contracting officer. [The failure to respond to the protester's letter is contrary to the agency's interest and our own policy urging that protesters initially seek resolution of their complaints with the contracting agency.] 4 C.F.R. § 20.2(a) (1980). [The matter is being called to the attention of the GSA Administrator by letter of today.]



Acting Comptroller General
of the United States